Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	WC Docket No. 04-223
Forbearance Pursuant to 47 U.S.C.	)	
§ 160(c) in the Omaha Metropolitan	)	
Statistical Area	)	
	)	

OPPOSITION OF AT&T CORP.

Leonard J. Cali	Stephen C. Garavito
Lawrence J. Lafaro	James J. R. Talbot
AT&T Corp.	AT&T Corp.
One AT&T Way	1120 20th Street, N.W.
Room 3A214	Suite 1000
Bedminster, NJ 07921	Washington, DC 20036
	202-457-3878

Its Attorneys

August 24, 2004

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area	)	WC Docket No. 04-223
	)	

OPPOSITION OF AT&T CORP.

Pursuant to section 1.415 of the Commission's rules, 47 U.S.C. § 1.415, AT&T Corp. ("AT&T") hereby opposes the petition by Qwest Corporation ("Qwest") for forbearance pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area ("Omaha MSA"). As demonstrated herein, Qwest's requested relief is barred by the plain language of the Communications Act (the "Act"). Moreover, Qwest has failed utterly to meet the burden required by the Act for forbearance. Qwest's petition accordingly must be denied.

I. INTRODUCTION AND SUMMARY

Through its petition, Qwest attempts to raise the art of overreaching to a new level. In the *Triennial Review* proceeding and elsewhere, Qwest and its sister Bells were the strongest proponents of "true" facilities-based competition based on unbundled access to the Bells' local loops, and consistently argued that their hot-cut systems and processes could support such UNE-L competition.[1] Qwest now would have the Commission act to relieve it of any obligation to unbundle its local loops, which are perhaps the ultimate bottleneck facilities, despite the fact that there are no widely available alternatives to such loops and other last-mile access facilities. Indeed, the Commission recently held in its *Triennial Review Order* that the ability of new providers to compete with incumbent LECs would be impaired without access to such loops.[2] This determination was *not* upset in the *USTA II* decision.[3]

However, Qwest does not seek merely to be excused from the Act's loop unbundling obligations. Its petition demands far broader relief. Indeed, although it expresses a desire to negotiate commercial arrangements with carriers, the very first demand on Qwest's list is to be freed of the Act's requirement that it negotiate in good faith (§ 251(c)(1)). Qwest goes on to demand relief from its duties under the Act to interconnect at any technically feasible point (§ 251(c)(2)), to provide access to network elements on an unbundled basis (§ 251(c)(3)), to provide resale of its retail services at a

---

[1] *See, e.g.*, Letter from R. Steve Davis, Qwest, to Michael K, Powell, FCC, in CC 01-338 (dated Feb. 12, 2003) at 2 (arguing that CLECs would not be impaired without access to unbundled switching because ILECs were capable of providing "the hot cuts required to use unbundled loops with competitive switches" in significant volumes); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, in CC 01-338 (dated Feb 12, 2003), attached presentation at 14 (arguing that unbundled switching should be removed from UNE list because "CLECs may order either Resale or Unbundled Loops"); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, in CC 01-338 (dated Oct. 30, 2002), attached presentation at 2, 5-6 (describing proposed transition from UNE-P to UNE-L).

[2] *See, e.g., Review of Section 252 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶¶ 248, 253, 288, 325-326 (finding, among other things, that CLECs would be impaired without access to copper loops, copper subloops (including inside wiring), the non-packet capabilities of hybrid loops, and DS1 loops) (2003) ("*Triennial Review Order*").

[3] *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

wholesale discount (§ 251(c)(4)), to provide notice of network changes (§ 251(c)(5)), and to permit physical collocation for interconnection and access to network elements (§ 251(c)(6)).

Even this unprecedented relief from the § 251(c) obligations would not be enough for Qwest. It also demands that it be excused from its statutory obligations under the 271 checklist to provide: (i) interconnection; (ii) access to unbundled network elements; (iii) access to its poles, ducts, conduit, and rights-of-way; (iv) unbundled access to its local loops; (v) unbundled access to local transport; (vi) unbundled access to local switching; and (xiv) resale at a wholesale discount.

Even if there were no insurmountable legal barriers to granting such forbearance from statutory duties – which there are – Qwest submits no evidence whatsoever of widespread competition to provide *wholesale alternatives* to Qwest' last mile access (which Qwest identifies as the relevant product market for analyzing its market power[4]) that could justify such unprecedented relief. Instead, Qwest focuses solely on purported *retail* competition, and, in a bootstrapping maneuver of monumental proportions, Qwest attempts to justify its demand to be excused from its statutory unbundling and resale obligations by citing to wireline retail competition that exists *solely* because of Qwest's obligation to provide UNE-P, UNE-L, and resale. For example, at the same time that Qwest argues it should not have to comply with the resale obligations imposed by sections 251(c)(4) and 271(c)(2)(B)(xiv), it contends (pp. 16-17) that the 1996 Act allows "competitive providers to increase their market presence through resale beyond the reach of their own networks." Similarly, Qwest identifies McLeodUSA as one of the

[4] Petition p. 6.

key facilities-based wireline providers in Omaha, while at the same time pointing out that *100%* of McLeod's service offerings rely on inputs from Qwest that would be eliminated if Qwest's petition were granted, *i.e.*, UNE-L (65%), UNE-P (30%), and resale (5%).[5]

Qwest also cites to the presence of providers of voice-over-Internet protocol ("VoIP") services in Omaha while its own petition concedes that two of these alleged providers are *not* offering service in the Omaha MSA. Indeed, the evidence shows that *none* of the purported VoIP providers are offering significant service – if any – in the Omaha MSA. Indeed, most do not offer Nebraska or Iowa telephone numbers to their subscribers.[6] And Qwest's claims regarding *retail* cable telephony competition by Cox in Omaha appear to be vastly overstated. Moreover, Qwest does not cite to, or submit, the source material for its claims, which would presumably show that Qwest has misunderstood – if not misrepresented – Cox's prior statements.

Furthermore, Qwest's claim of overwhelming *retail* competition relies on market share estimates based on E911 counts, which AT&T and others showed in the *Triennial Review* proceeding – and which AT&T shows again here – could not be used to extrapolate the extent of local competition.[7] In fact, Qwest itself, in a related context, has observed that "assigned numbers bear no correlation to actual lines in service." Qwest also argues – again citing an internal survey, which it conspicuously does not produce – that wireless providers are a substitute for Qwest's local exchange offerings in Omaha. Yet, the Commission has determined that wireless services complement – but are not a replacement for – local exchange services, and Qwest's sister Bells (BellSouth and SBC)

---

[5] Teitzel Aff. p. 18.

[6] *See* pp. 12-13, *infra*.

[7] *See* Lancaster/Morgenstern Declaration, attached hereto as Attachment A.

have urged the Commission to find that wireless and local exchange services are *not* in the same product market.

In all events, section 271(d)(4) bars the Commission from limiting the terms of the section 271 competitive checklist "by rule" or "otherwise," and the Petition's request for forbearance from compliance with sections (i)-(vi) and (xiv) of the competitive checklist must be denied on this ground alone. In addition, Qwest's petition is fatally premature because section 10(d)(4) prohibits the Commission from forbearing from any requirements of sections 251(c) and 271 before those sections are "fully implemented." As required by the objectives and purposes of the Act, sections 251(c) and 271 cannot be considered fully implemented until there is ubiquitous availability of durable, cost-based wholesale alternatives to Qwest's bottleneck facilities. Qwest has not made, and cannot make, such a showing. For these same reasons, Qwest fails to meet its burden under sections 10(a)(1)-(3) to establish that: (i) compliance with the sections 251(c) and 271 requirements are not necessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the services that would be affected by their removal; (ii) enforcement of these requirements is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest.

II. QWEST HAS NOT MET ITS BURDEN OF SHOWING THAT IT LACKS MARKET POWER IN THE PROVISION OF WHOLESALE SERVICES AND INPUTS.

Assuming Qwest could overcome the legal barriers to its petition, the critical inquiry underlying its request for forbearance – as Qwest itself recognizes – is whether it retains market power in the provision of the *wholesale* services and inputs it is required to provide under §§ 251(c) and 271. Petition p. 6 (relevant product market "is the market for services provided under Section 251(c) and selected services under Section 271");

Selwyn Decl. ¶¶ 14-16. Yet, Qwest has introduced no evidence of any such wholesale competition whatsoever. Instead, Qwest has focused solely on *retail* competition that purportedly exists in the Omaha MSA. The reasons for this focus by Qwest is obvious: the company that Qwest identifies as its principal *retail* competitor – Cox – does not offer wholesale services or inputs to other local exchange or broadband services providers.

This lack of any evidence of wholesale competition should be the end of the Commission's inquiry, and Qwest's petition should be summarily dismissed. This is especially true because much of Qwest's claimed retail competition relies upon the very wholesale inputs Qwest proposes to eliminate. Moreover, even if one focuses solely on retail competition, as Qwest would have the Commission do, it is readily apparent that Qwest's claims of vibrant, sustainable retail competition ring hollow. Indeed, one of Qwest's sister Bells has boasted that telecom is now "evolving to a handful of 'super carriers,'" in which a few dominant carriers, *i.e.*, the Bells, will dominate the telecommunications landscape, while all others will be relegated to "niche" positions that escape the super carriers' interest.[8]

A. Qwest's Retail Market Share Estimates Are Flawed.

As established below, Qwest's petition fails totally to demonstrate the existence of any wholesale alternatives for the inputs competitive carriers need to provide local exchange service. Instead, Qwest focuses solely on the existence of purported retail competition to justify its demand for forbearance. AT&T herein demonstrates that the extent of such competition by wireline, VoIP, cable, and wireless providers is exaggerated, if not non-existent. However, at a more basic level, Qwest's petition errs in

---

[8] *See* Communications Daily, Vol. 24, Issue 120, "*Whitacre Announces Fiber to Neighborhood Initiative*," June 23, 2004 (quoting SBC Chairman Edward Whitacre).

overstating the competitive significance of such retail offerings – and systematically understating the extent of Qwest's market dominance – in two principal ways: (1) by including in its analysis areas in which Qwest does not even offer local exchange service; and (2) by basing its retail market share analysis on E911 data.

Qwest attempts artificially to limit its retail market share by improperly treating the *entire Omaha MSA* as the relevant geographic market for the assessment of Qwest's local market power when Qwest provides local service only in a small part of this very large area. The Omaha MSA is even larger than Qwest describes and comprises eight counties, five in Nebraska and three in Iowa, and 4,363 square miles.[9] Whether the MSA is defined to include five or eight counties, it is plainly overbroad because Qwest provides local service only in Sarpy County, Nebraska, and *parts* of Douglas County, Nebraska and Pottawattamie, Harrison, and Mills counties, Iowa. Selwyn Decl. ¶ 20. It appears that Qwest provides *no* service in Cass, Saunders and Washington counties, Nebraska. *Id.* Even Qwest admits that the MSA "contains territory served by Qwest (primarily the greater Omaha and Council Bluffs areas) *as well as areas served by Independent Telephone Companies*." Teitzel Aff. p. 14.

A geographic market is "the area of effective competition . . . in which the seller operates and to which the purchaser can effectively turn for supplies."[10] Consistent with this hornbook antitrust approach, Commission precedent makes clear that the relevant

---

[9] Qwest incorrectly contends that the Omaha MSA covers 2,000 square miles and comprises "five counties, including Douglas, Sarpy, Washington and Cass counties in the State of Nebraska as well as Pottawattamie County in the State of Iowa." Petition ¶ 7. In fact, as defined by the Office of Management and Budget, the Omaha MSA covers 4,363 square miles and comprises *eight* counties, five in Nebraska, including Saunders, and three in Iowa, including Harrison and Mills. Selwyn Decl. ¶ 20.

[10] *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

geographic market for the assessment of a carrier's market power over local services is confined to the area in which the carrier provides those services. For example, Qwest's cited authority, the *Bell Atlantic/NYNEX Order,* found that a relevant geographic market for the analysis of the Bell Atlantic/NYNEX merger was "LATA 132, which essentially covers the same territory as NYNEX's New York Metropolitan Regional Calling Area" because "*any carrier that offers service in the New York Metropolitan Regional Calling Area offers that service to all customers in that area*."[11] Similarly, the International Bureau has rejected claims that national geographic markets should be used to evaluate the market power of foreign regional local access monopolists and has found that the relevant geographic market is the local franchise area.[12]

By including within its retail market share analysis those portions of the MSA where it does not even offer service, Qwest has artificially minimized its market share. This is especially so here because Qwest has failed to attribute any local retail customers to the other incumbent LECs serving the Omaha MSA. Instead, Qwest has assumed that any lines in the MSA that it does not serve must be served by a competitive carrier. Because any meaningful analysis of Qwest's local market power must be based on

[11]*Applications of NYNEX Corp. & Bell Atlantic Corp*., 12 FCC Rcd. 19,985, ¶ 55 (1997) (emphasis added). *See also, id*. ¶ 54 (relevant geographic market is an "area in which all customers in that area will likely face the same competitive alternatives"). Significantly, LATA 132 is part of the much larger New York-Northern New Jersey-Long Island MSA. Selwyn Decl. ¶ 24. Similarly here, the Commission should limit the relevant geographic market to the much smaller area where Qwest provides local services and where customers therefore "face the same competitive alternatives."

[12] *See, e.g*., *Americatel Corp. & Telecom Italia of North America, Inc*., File Nos. ITC-MOD-20020508-00243 & ITC-MOD-20020508-00244, Memorandum Opinion and Order (rel. May 27, 2004), DA 04-1538, ¶ 18; *Americatel Corp. & Telecom Italia of North America, Inc*., File Nos. ITC-MOD-20020502-00212 & ITC-MOD-20020502-00213, Memorandum Opinion and Order (rel. Dec. 30, 2003), DA 03-4115, ¶ 14; *Bell Canada Petition for Declaratory Ruling*, IB Docket No. 98-148, Order, DA 01-1421, 16 FCC Rcd. 12465, ¶¶ 8-9 (2001).

Qwest's market share in the parts of the Omaha MSA in which Qwest in fact offers local services, the Commission should reject the overbroad geographic market claimed by Qwest and deny its petition.

Qwest's retail market share analysis also depends in large measure on E911 data, which is "an inaccurate and unreliable measure of competition in the local market." Lancaster/Morgenstern Decl. ¶ 13. The sole purpose of including telephone numbers in the E911 database is to ensure proper emergency response for 911 users, and "*not* to catalogue correctly the number of telephone lines provided by any one carrier." *Id.* ¶ 6 (emphasis added). Indeed, there are a number of factors that "would cause the E911 database to overstate the number of lines served by CLECs." *Id.* ¶ 13. For example, when a large volume of numbers migrates to AT&T's service from another carrier, AT&T has no easy way to determine which numbers should be included in the E911 database. AT&T therefore takes the conservative approach of including all ported numbers, including DID numbers, in the E911 database. *Id.* ¶ 10. AT&T's listings in the E911 database thus include "a significantly larger number of telephone numbers than the actual facilities needed to provide emergency service." *Id.* Moreover, inactive numbers can remain in the E911 database for extended periods, either because carriers postpone the "cleaning up" of such numbers, or because a number of CLECs have withdrawn from the market and abandoned telephone numbers without cleaning up the E911 database. *Id.* ¶¶ 11-12.

In a related context, the ILECs have recognized the fallacy of using telephone numbers as a gauge for actual end users. In the Commission's proceeding regarding outage reporting, *New Part 4 of the Commission's Rules Concerning Disruptions to*

Communications, ET Docket No. 04-35, the comments filed by the Bells and other ILECs, including Qwest, established that "assigned telephone numbers" should not be used as the threshold for reporting requirements because *assigned numbers do not correlate to actual lines in service*.[13] For example, Verizon noted in its comments (p. 9) that "many customers subscribe to blocks of numbers that they activate only as needed, such as when the number of stations behind a PBX is increased, or that they retain to prevent other customers from using certain telephone numbers." It therefore "has no way of knowing how many numbers the customer is actually using." *Id.*, pp. 9-10. Qwest stated (p. 6) that "'Assigned telephone numbers' bear no correlation with end users."[14] As USTA summarized, "LECs have no way of knowing how many numbers a customer is using. LECs can measure only the number of lines and trunks that they deliver to a customer's premise. More specifically, the number of assigned numbers does not correlate with the number of customers or access lines." USTA Comments, p. 17.

The effect of Qwest's assumptions has been to systematically overstate the existence of retail competitive local services providers and understate Qwest's enduring market power. The Petition should be denied based on these flaws in Qwest's *retail* market share analysis alone.

---

[13] *See* Lancaster/Morgenstern Decl. ¶ 14. The respective Bell and ILEC comments in ET Docket No. 04-35 were filed on May 25, 2004.

[14] *See also* BellSouth Comments, p. 7 ("the quantity of 'assigned' numbers held by a carrier has little correlation to the number of customers or customer lines"); SBC Comments, p. 4 ("The number of 'assigned telephone numbers' has little correlation to the number of customers or customer lines in use . . . ."); Sprint Comments, p. 10 ("Neither the LECs nor the IXCs can determine such impact simply by referring to assigned telephone numbers"); Verizon Comments, p. 9 (Basing outage reports on the number of telephone numbers that are affected by an outage "would be an inherently unreliable measure of the impact of the outage").

B. Qwest Has Failed to Demonstrate the Existence of Wireline Wholesale Competition.

Having defined the "relevant product market" as "the market for services provided under Section 251(c) and selected services under Section 271"[15] – which, by their nature, are in all cases *wholesale* services and inputs – Qwest fails to introduce *any* evidence of wireline wholesale alternatives to the basic inputs the Act requires it to provide under §§ 251(c) and 271. Instead, Qwest cites to retail services provided by Alltel and McLeod. Yet, as Qwest acknowledges, Alltel is primarily an incumbent LEC providing services outside of Qwest's service territory. In fact, as an ILEC, Alltel is the second largest local exchange carrier in Nebraska, with 24.7% (274,416 lines) of the states total access lines as of January 1, 2003. Teitzel Aff. p. 22. Its CLEC operations are much more limited, with only about 22,000 total access lines *statewide*. *Id.* Moreover, Qwest provides no evidence whatsoever that Alltel provides wholesale services to competitive local exchange carriers in the Omaha MSA.

Qwest's "evidence" regarding McLeod's operations in the Omaha MSA is even less compelling. Qwest candidly concedes that McLeod is entirely dependent on the wholesale inputs that Qwest would be free to cease providing if its petition were granted. Thus, the Teitzel Affidavit states (p. 18) that, as of December 31, 2003, 65% of McLeod's service was provided using unbundled loops, 30% was provided using the unbundled network element platform (unbundled loops and switching), and 5% was provided via resale of Qwest's retail services. In short, *100%* of McLeod's retail services depend on wholesale inputs that would disappear if Qwest's petition were granted.

---

[15] Petition p. 6.

Qwest's analysis also focuses entirely on the residential market and fails to address at all Qwest's dominance in the provision of local services to business customers. In the *Triennial Review Order*, the Commission expressly determined that CLECs would be impaired without access to unbundled DS1 and DS3 loops (below the three DS3 level)[16] and transport facilities below the optical (OCn) level.[17] Yet, Qwest would have the Commission remove unbundled access to such loops and transport facilities without any evidence of alternative providers. Indeed, its evidence shows that its principal wireline competitor is entirely reliant on Qwest's services and facilities. And, cable companies, such as Cox, provide minimal retail services to business customers[18] and provide no wholesale services at all. Qwest's failure to produce any evidence relating to its market power with respect to large business customers demonstrates conclusively that its petition must be denied.

Because Qwest has failed to demonstrate the existence of any ubiquitous and durable wholesale alternatives provided by wireline carriers, and Qwest itself has shown that wireline *retail* competition relies wholly upon the wholesale inputs Qwest would eliminate, Qwest's petition must be denied.

---

16 *Triennial Review Order* ¶ 298.

17 Selwyn ¶ 52.

18 For example, in 2003, "cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited success in the remote office market, reaching only 4.2 percent of the market in 2003". Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added). As the Yankee Group recognizes, "*DSL operators dominate* the U.S. [small business] broadband and enterprise remote-office broadband market." *Id.* p. 4.

C. Qwest Has Failed to Demonstrate the Existence of Any Competition by Voice over Internet Protocol Providers.

As scanty as Qwest's evidence of wholesale and retail wireline competition is, its evidence of VoIP competition is virtually nonexistent. Again, Qwest does not – and cannot – demonstrate the existence of any wholesale competition from VoIP providers in the Omaha MSA. Indeed, Qwest presents no credible evidence of any *retail* VoIP competition. Qwest claims there are seven VoIP providers currently serving the Omaha MSA – AT&T CallVantage[sm], Five Star Telecom, Vonage, Packet8, VoicePulse, BroadVoice, and ZipGlobal. Teitzel Aff. pp. 26-27. Yet, Qwest itself admits that AT&T CallVantage service is "not yet available in Nebraska," and that Voice Pulse "is currently not offering numbers within Nebraska area codes." *Id.* pp. 26, 27 n.59. Qwest's citation to retail competition from companies that it concedes do not even offer service in the Omaha MSA is bad enough, but even a cursory review of the other alleged VoIP competitors reveals that they likewise do not offer any significant retail – much less wholesale – competition to Qwest in Omaha. Thus, a review of the BroadVoice, Vonage, and ZipGlobal websites shows that none of them offers VoIP services in the Omaha MSA.[19] And, Packet8 had only 17,000 subscribers *worldwide* as of June 30, 2004.[20]

---

[19] BroadVoice is not providing service in Nebraska or Iowa, and neither state is on its "Coming Soon" list. http://www.broadvoice.com/company.html It also does not offer Nebraska or Iowa area codes. http://www.broadvoice.com/areacodes.html Vonage also does not currently offer VoIP services in Nebraska or Iowa (http://www.vonage.com/corporate/index.php) and does not offer Nebraska or Iowa area codes. http://www.vonage.com/avail.php ZipGlobal does not offer Nebraska or Iowa numbers. http://zipglobal.com/localnumbers.html

[20] http://www.8x8.com/news_events/releases/2004/pr072804.asp.html It is difficult to tell from a review of Five Star Telecom's website whether it has any subscribers at all, much less a significant number of subscribers in the Omaha MSA. *See* http://www.fivestartel.com

The Bells themselves do not view VoIP as significant local exchange competition. Instead, they view VoIP services as "a 'niche product' that may not live up to the considerable hype surrounding them."[21] According to Verizon CFO Doreen Toben, "[t]he marketing research would suggest, and this is a quote from them, this is for 'the single geeky guys' who are basically OK having one phone in the house they can use this way." *Id.* Moreover, Ms. Toben proclaims that "early feedback from users of other services suggests the technology may still be too complicated for many customers." *Id.*

In short, Qwest has failed to produce any evidence of significant wholesale or retail competition by VoIP providers in the Omaha MSA.

D. Qwest Has Failed to Demonstrate the Existence of Wholesale Cable Telephone Competition and Vastly Overstates the Presence of Retail Cable Telephony.

Although Qwest seeks to be excused from its statutory obligations to provide wholesale services and inputs, it has provided no evidence whatsoever that Cox, the cable company in the Omaha MSA, is an alternative source of such wholesale inputs. Nor can it. It is undisputed that cable companies, including Cox, do not provide wholesale access to their facilities to competitive telecommunications carriers.[22] Instead of focusing on the availability of wholesale inputs from Cox, Qwest attempts to paint Cox as the dominant competitive *retail* provider of local exchange service. Yet, Qwest relies upon undocumented 2-year old statements that appear to have been misunderstood by Qwest

[21] Reuters News, "*Interview – Verizon says Internet phones a niche product*" (Jul. 27, 2004) (quoting Verizon CFO Doreen Toben).

[22] In the *Triennial Review Order*, the Commission recognized that "[p]roviders of viable intermodal alternatives to mass market customers have shown no inclination to provide access to competing carriers to serve their customers, nor would we expect them to" because "[a] provider that has privileged access to a single mass market customer potentially will lose the customer if it provides wholesale access to a potential competitor." *Triennial Review Order* ¶ 310, n.904.

and which paint a garbled, misleading, and unsubstantiated picture of retail cable telephony competition.

AT&T assumes that Cox will respond directly to the representations Qwest makes regarding Cox's telephone operations in the Omaha MSA. However, serious credibility issues are raised by Qwest's description of those operations. The Teitzel Affidavit refers (p. 11) to a May 9, 2002 investor meeting in which Cox purportedly described its Omaha cable telephony operations. Significantly, Qwest provides no citation to the quotes or statistics from that meeting and has provided no documentation of these alleged disclosures. Moreover, it is apparent that Qwest has added 2 plus 2 and reached its desired result of 10. Even taking the numbers reported by Qwest at face value – which they should not be – it is clear that Qwest has significantly overstated Cox's competitive presence at the retail level.

First, Qwest states that Cox's Omaha system "was comprised of 295,863 serviceable homes" as of April 30, 2002.[23] At the same time, however, Qwest claims that the Omaha MSA contains 241,721 households as of the 2000 Census.[24] Thus, Qwest claims that Cox has 54,000 more serviceable homes in the Omaha MSA than actually exist. The only reasonable explanation is that Cox's Omaha system – and that system's "homes passed" – encompasses homes that lie outside the Omaha MSA. Furthermore, in its most recent annual report, Cox reported that, out of 10,426,093 basic cable homes passed nationwide, only 5,031,401 homes were "telephone ready," *i.e.*, only 48% of its

[23] Teitzel Aff. p. 11.

[24] Petition p. 7. As noted in the Selwyn Affidavit (¶ 20), the Omaha MSA is three counties larger than claimed in the Petition.

total homes passed are telephone ready.[25] This is the source of the statement cited by Qwest that Cox's telephone service was "*available* to 48 percent of our homes passed."[26] With respect to its 5 million telephone-ready homes, Cox has a penetration rate of 19.5%. Thus, even if Cox passed every home in the Qwest-defined Omaha MSA, applying the Cox-reported ratios to its "homes passed" would show that Cox has only 22,625 telephone subscribers in the Omaha MSA (241,721 x .48 x .195 = 22,625), orders of magnitude less than the 148,000 cable telephony subscribers Qwest ascribes to Cox.[27]

Moreover, despite Qwest's contentions, cable companies are also dependent on unbundled access to incumbent LEC facilities in order to provide local exchange services. For example, in late 2000 and early 2001, in Washington State, AT&T's cable unit, AT&T Broadband, could not provide cable telephony to tenants in multiple dwelling units ("MDUs"), because Qwest implemented a policy of placing padlocks on its terminals and denying AT&T Broadband reasonable access to Qwest's subloop inside wiring. As a result of Qwest's padlocking of its terminals, AT&T Broadband could not market its services to hundreds of customers for several months, was forced to delay and reschedule countless installation orders (resulting in loss of revenues), and suffered, not surprisingly, cancelled orders when customers that expected AT&T Broadband service

[25] Cox Communications 2003 Financial Results, available at http://media.corporate-ir.net/media_files/IROL/76/76341/reports/AR_2003/assets/pdfs/cox_2003results.pdf

[26] *See* Teitzel Aff. p. 10 (emphasis added). Qwest appears to have confused availability with actual subscribership.

[27] *See* Petition p. 12 n.38. As noted above, Cox is in the best position to describe its operations in the Omaha MSA. AT&T provides this analysis solely to show that Qwest's submission does *not* demonstrate the existence of substantial retail competition, much less available alternatives for the wholesale inputs it wants to remove from the table. Moreover, as noted above, Qwest has submitted no evidence that Cox provides retail services to large business customers.

were denied such service. Ultimately, the Washington Utilities and Transportation Commission ruled against Qwest's policy of denying reasonable access to its inside wiring subloops in MDUs, and held that AT&T Broadband was entitled to "access" to MDUs via Qwest-owned inside wiring.[28] Nevertheless, cable companies, including Cox, still rely on unbundled access to Qwest's subloops to serve a significant number of the customers who reside in MDUs.

Finally, if Qwest's petition were granted, competitive carriers would be denied access to the wholesale inputs they need and only Qwest and Cox would be able to continue providing services to residential consumers. As Dr. Selwyn cautions, the resulting duopoly would stifle innovation and ultimately cause higher prices. Selwyn Decl. ¶¶ 76-82. The Commission has recognized that duopolies do not produce the competition contemplated by the 1996 Act.[29] It should not encourage the creation of such a duopoly through the grant of Qwest's petition.

E. Qwest Has Failed to Demonstrate that Wireless Competition Constrains Its Market Power.

Qwest's claims that wireless services prevent the abuse of Qwest's market power over the local wireline bottleneck in Omaha lack any basis. Even if some substitution

---

[28] *AT&T Communications of the Pacific Northwest, Inc.* v. *Qwest Corp.*, No. UT-003120, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination, ¶¶ 44, 48 (Apr. 2001).

[29] *See EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002) ("[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."); *id.*, Statement of Chairmen Powell ("At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."). *Accord FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001).

may occur between wireline and wireless outbound long distance calling, wireless does not provide an effective substitute for local dialtone, as shown by the very small percentage of households that have replaced outright their wireline service with wireless service. As the Commission found in the *Triennial Review Order*, wireless is "primarily a complementary technology."[30] According to SBC Chairman and CEO Edward Whitaker, "wireless is not going to displace the wireline network" and is "*never* going to be the substitute. Reliability is one reason."[31]

The *Triennial Review Order* emphasized that "wireless CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity."[32] Also, unlike local wireline services, "CMRS is not yet capable of providing broadband services to the mass market – although a growing number of wireless carriers make available Internet access, such access is generally limited to transmissions of 25 to 66 kbps."[33]

Dr. Selwyn demonstrates that wireless services provide very ineffective and expensive substitutes for many of the calling purposes served by wireline services. Wireless phones are typically used by specific individuals, while wireline phones typically serve an entire "household," rather than a single individual user. As a result, there must be one wireless phone per person in multi-person households in order to replace wireline service. Otherwise, other household members would be stranded when

---

30 *Triennial Review Order* ¶ 230.

31 *Business Week Online*, Oct. 20, 2003 (emphasis added). *See also* SBC Communications Analyst Meeting, Nov. 13, 2003, Final Transcript at 12 ("Customers want both" wireless and wireline services).

32 *Triennial Review Order* ¶ 230.

33 *Id.*

the possessor of the phone takes the phone with him or her in order to obtain the benefits of mobility, which is the primary benefit of the wireless phone.[34] Therefore, as Dr. Selwyn shows, to compare (roughly) equivalent wireless and wireline packages, one would need to compare the total price of a wireline bundle with the total price of a "family" *multi-phone* wireless package, where all calls (including local calls and inbound calls) in excess of the monthly allowance are charged on a per minute basis. Selwyn Decl. ¶ 65-66.

Other unresolved technical issues also limit a household's ability to substitute wireless for wireline. Cellular phones are powered by rechargeable batteries, many of which have a maximum talk time of only an hour or two, as well as a standby battery life that degenerates significantly over time. Additionally, the reliability of cell phone E911 technology, which depends, in part, upon Global Positioning System ("GPS") satellites, is yet to be demonstrated, and in any event does not exist at the present time.[35]

As Dr. Selwyn describes, for these reasons, wireless bundles are a poor substitute for wireline as a means for satisfying a household's telephone service needs and the

---

[34] The ability to have several extension phones on a single wireline service greatly increases the utility of wireline services – and further differentiates wireline from wireless services – by allowing multiple family members to participate on the same outbound call and is even more important for inbound calls, particularly in the 68 percent of U.S. residences with multiple floors and the 41 percent of American households with three or more persons. Selwyn Decl. ¶¶ 66-67. This limitation may be partially addressed by devices that permit consumers to access their wireless handsets via conventional telephones connected to the inside wiring in their homes. Such devices have been announced in recent months by their manufacturers, but have not yet received any acceptance beyond the earliest of early adopters. The use of such a device would not diminish any of the other limitations on the utility of wireless services as the primary household telephone line, except perhaps in single person households.

[35] Selwyn Decl. ¶ 68. It is not clear that cell phones would even be able to "see" GPS satellites when used indoors, which is exactly where they would be used if substituted for a consumer's primary wireline service. *Id.*

availability of wireless services can provide little or no constraint on Qwest's local service pricing. Qwest does not show otherwise. Qwest's claims (pp. 9-10) that wireless services are reducing wireline *long distance* usage – while correct – are certainly beside the point, because, as shown above, households are likely to retain local wireline dialtone service even if they choose to make some long distance calls on their wireless phones.[36]

The *Triennial Review Order* noted that only "about three to five percent of CMRS subscribers are using their service as a replacement for *primary* fixed voice wireline service."[37] Qwest fails to show that Omaha consumers are "cutting the cord" to any significantly greater extent – even after the introduction of wireless number portability. Indeed, Qwest makes no showing that any Omaha customers rely exclusively on wireless services.

Qwest refers (p. 11) to its own internal survey of wireless customers, but has not bothered to provide that survey to the Commission. Yet, even this survey apparently provides no information on *Omaha customers* or the extent to which *any* Qwest customers may have replaced their primary fixed voice wireline service with wireless service.[38] Qwest's only evidence on this central point comprises vaguely described third party survey research by Advantis – which Qwest also has not submitted to the Commission – concerning consumers' purported "willingness" to rely exclusively on

---

[36] This conclusion is supported by the Census Bureau's September 2001 Computer and Internet Use survey (containing questions regarding wireline phone service). The data indicated that only .11% of survey respondents reported replacing home phone lines with wireless phones. Bureau of Labor Statistics, United States Department of Labor; Bureau of the Census, United States Department of Commerce, Current Population Survey, Computer and Internet Use Supplement, September 2001. Available at http://www.bls.census.gov/cps/ (accessed November 19, 2003).

[37] *Id.*

[38] Qwest apparently surveyed wireless users in Iowa and Utah. Petition p. 11.

wireless and a press release by a small wireless carrier, Cricket, which claims that 37 percent of its customers use only wireless.[39] Qwest fails to mention, however, that Cricket also states that these customers are largely single and/or aged 18-34 and/or living in one or two person households, and thus predominately are those for whom the advantages of wired service for multi-person household uses are likely to be much less important.[40]

There also is little evidence that number portability is resulting in any significant increase in the use of wireless service as a replacement for primary line voice service. Other BOCs have reported seeing little such effect. Although "[l]ocal phone companies had predicted that hundreds of thousands – possibly even millions – of customers would abandon wired phone service when new federal rules allowing such a switch took effect," SBC reported that "*the number who actually have taken the plunge is very small, numbering in the hundreds*."[41] Verizon similarly described the number of customers porting wireline numbers to wireless as "very, very small" and "insignificant."[42] As described by Dr. Selwyn, the fact that few consumers take the opportunity to drop wired phone service when they move to a new home also suggests that wireless LNP is "not likely to significantly increase substitutability."[43]

---

[39] *Id.*

[40] http://www.leapwireless.com/press/content/2003/051203.html.

[41] *Demand lacking for home-to-cell phone number moves*, Chicago Tribune (Dec. 10, 2003).

[42] 2003 Verizon Earnings Conference call and Investor Conference, Jan. 29, 2004 Fair Disclosure Wire, Westlaw 65933276

[43] Selwyn Decl. ¶ 72.

Significantly, Cingular, which is controlled by BellSouth and SBC, seeks approval of its proposed merger with AT&T Wireless by contending that wireless and wireline services are *not* sufficiently close substitutes to be treated as part of the same relevant antitrust product market. According to the antitrust economist representing Cingular and AT&T Wireless, who is a former Deputy Assistant Attorney General for Economics in the DOJ Antitrust Division, "[a]t the present time, *wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market*." Declaration of Richard Gilbert, ¶ 44 (emphasis added), Cingular and AT&T Wireless, Application for Assignments of Authorization and Transfer of Control, Mar. 18, 2004.

Qwest's claims also overlook wireless carriers dependence on special access facilities provided by Qwest to connect end users to their points of presence and to carry traffic between their switches and the cell stations where antennas establish connections to users.[44] The ILECs account for more than 90 percent of AT&T Wireless's transport costs and about 96 percent of the special access transport needs of T-Mobile.[45]

Qwest thus has failed to demonstrate that wireless competition constrains its market power. Although wireless service complements wireline service, it does not provide an effective substitute for local dialtone, and according to SBC's Chairman it will "*never*" be a substitute for wireline service.

---

[44] *See, e.g.*, Comments of AT&T Wireless, WC Docket No. 02-112, filed June 30, 2003, at 8.

[45] *Id.* at 9.

III. SECTION 271(d)(4) AND SECTION l0(d) OF COMMUNICATIONS ACT EACH INDEPENDENTLY BAR THE REQUESTED FORBEARANCE RELIEF.

Qwest's request for forbearance from the requirements of sections 251(c) and 271 is barred by sections 271(d)(4) and 10(d) of the Act. Section 271(d)(4) bars the Commission from limiting the terms of the section 271 competitive checklist "by rule" or "otherwise," and Qwest's request for forbearance from compliance with sections (i)-(vi) and (xiv) of the competitive checklist must be denied on this ground alone. In addition, Qwest's petition is fatally premature because section 10(d)(4) prohibits the Commission from forbearing from any requirements of sections 251(c) and 271 before those sections are "fully implemented." As required by the objectives and purposes of the Act, sections 251(c) and 271 cannot be considered fully implemented until there is ubiquitous availability of durable, cost-based wholesale alternatives to Qwest's bottleneck facilities. Qwest has not made, and cannot make, such a showing. For these same reasons, Qwest fails to meet its burden under sections 10(a)(1)-(3) to establish that: (i) compliance with the sections 251(c) and 271 requirements are not necessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the services that would be affected by their removal; (ii) enforcement of these requirements is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest.

A. Section 271(d)(4) Bars the Commission from Limiting the Competitive Checklist.

Section 271(d)(4) is an express "limitation on [the] Commission."[46] The statute provides that the Commission "may not," either by rule "or otherwise," "limit the terms used in the competitive checklist." That, of course, is precisely what Qwest seeks in its

[46] 47 U.S.C. § 271(d)(4).

forbearance petition. But, the plain text of section 271(d)(4) is absolute and unqualified – the Commission is expressly precluded, "by rule or otherwise," from "limit[ing]" the terms of the competitive checklist. Qwest's forbearance petition clearly asks the Commission to "limit" the competitive checklist within the plain meaning of that term;[47] if its petition were granted, Qwest would have no obligation to comply with sections (i)-(vi) and (xiv) of the competitive checklist. Because section 271(d)(4) expressly prohibits the Commission from imposing such limits "by rule or otherwise," Congress could not have more clearly commanded that the Commission may not limit the competitive checklist through *any* means or procedural device, including any attempt at limitation by forbearance.

Qwest's petition ignores completely the strictures of § 271(d)(4). Instead, Qwest argues that once a 271 application has been granted and (in Qwest's view) the checklist requirements have been "fully implemented," the checklist requirements are eligible for forbearance under section 10(a).[48] This argument, though, is foreclosed by the plain text of section 271(d)(4), which contains no language whatsoever limiting its application to the period before a section 271 application is granted.

In all events, Qwest's position is contrary to the very structure of section 271 and the role the competitive checklist plays in ensuring that local markets remain open to competition. Congress recognized that once a BOC obtained long distance authority, there would be a serious risk of "backsliding." Thus, "obtaining section 271 authorization is *not* the end of the road" and Congress made clear that the requirements of section 271,

---

[47] *See* Webster's Revised Unabridged Dictionary *(*to "limit" is to "*terminate,* circumscribe, or restrict") (emphasis added).

[48] Petition pp. 30-31.

including the section 271 checklist, endure long after the BOC receives section 271 authorization."[49]

Section 271(d)(6) accordingly imposes on the Commission an ongoing obligation to ensure that BOC local markets remain open to competition even after the BOC has satisfied the competitive checklist and obtained section 271 approval. Section 271(d)(6) empowers the Commission to act *sua sponte* to remedy violations of section 271, requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as Qwest contends, the Commission is free through forbearance to limit the terms of the competitive checklist after section 271 authorization has been granted. And, as explained below, the Commission has already rejected Qwest's position that the competitive checklist is fully implemented once a section 271 application is granted.

B. Section 10(d) Prohibits the Commission from Forbearing from Any Requirement of Sections 251(c) and 271 before those Sections Are "Fully Implemented."

Qwest's petition is also fatally premature in seeking forbearance from the obligations contained in sections 251(c) and 271. Section 10(d) places an explicit "[l]imitation" on the remainder of section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines

[49] *See* Memorandum Opinion and Order, *Application By Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service In the State of New York*, 15 FCC Rcd. 3953, ¶¶ 448, 453 (1999) (stating that "obtaining section 271 authorization is not the end of the road" and that the "critically important power" in section 27l(d)(6) "underscores Congress's concern that BOCs continue to comply with the statute") (emphasis added).

that those requirements have been fully implemented."[50] The Commission considers section 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the petition without consideration of its merits.[51]

Qwest's submission does not begin to demonstrate that *all* – or even *any* – of the requirements of sections 251(c) and section 271 have been "fully implemented." Nor could it. The objectives and purposes of the Act suggest that the requirements of section 251(c) and 271 will be "fully implemented" when, at a minimum, there is ubiquitous availability of cost-based *wholesale* alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets.[52] The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities.[53] The requirements of sections 251(c) and 271 are not fully implemented,

---

[50] 47 U.S.C. § 160(d).

[51] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd. 23525, ¶¶ 5, 9 (2003) ("*Verizon Forbearance Order*").

[52] As demonstrated above, Qwest has failed to establish the existence of any alternative source for the wholesale inputs competitive local exchange carriers require.

[53] *Cf. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 532, 538 (2002) (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

according to the plain meaning of those terms, where Qwest has failed to demonstrate any wholesale alternatives to the inputs it is required to provide under those sections.

Section 10(d) thus precludes the Commission from even considering the regulatory forbearance Qwest seeks until all of the market-opening requirements of sections 251(c) and 271 have been fully implemented. Because there is no sustainable construction of section 10(d) under which the "fully implemented" requirement could be found satisfied, the Commission has no authority to grant Qwest's request that it forbear from applying the requirements of sections 251(c) and 271 to Qwest in the Omaha MSA.

Qwest contends, however, that its receipt of section 271 authority to provide interLATA services in Nebraska establishes that it has fully implemented sections 251(c) and 271. Qwest is wrong. The Commission's section 271 precedents confirm that the Commission was not making any comprehensive determination in its section 271 authorization decisions that the requirements of section 25 l(c) and 271 were themselves "fully implemented" or, indeed, even that the BOC applicant had "fully implemented" the requirements of section 251(c) and section 271. Early on in evaluating section 271 applications, the Commission held that its review would be quite limited in important respects. First, the Commission held that it would not evaluate whether a BOC had complied with rules that were promulgated, but not effective at the time of the application.[54] Thus, for example, the Commission did not evaluate whether SBC in Texas complied fully with all of the Commission's rules implementing Rule 319 because those rules went into effect shortly after SBC filed its application, and the Commission

[54] Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354, ¶ 30 (2000).

undertook no assessment of whether SBC implemented operational support systems to accommodate line sharing.[55] Likewise, Verizon in New York was not required to show compliance with any aspect of the Commission's Rule 319 regulations.[56] In this regard, the Commission stressed that its rules "vary with time" and that the section 271 process would only work if the BOC's application were judged soley against those rules that were "fix[ed]" at the time of the application.[57]

Second, the Commission observed that its existing rules do not address many local competition issues or are ambiguous in key respects, and thus held that it would only evaluate section 271 applications with respect to a BOC's compliance with "clear" rules or "self-executing" requirements of the Act.[58] In so holding, the Commission observed that the "fast track" 90-day section 271 process was not an appropriate forum for addressing "fact-intensive" disputes about an individual BOC' s compliance with the Act or resolving "industry-wide local competition questions."[59]

In all events, the Commission *rejected* Qwest's position in the *Verizon Forbearance Order*. Specifically, the Commission expressly rejected the notion that the

---

[55] *Id.* ¶¶ 32, 33.

[56] *Id.* ¶ 32.

[57] *Id.* ¶ 27.

[58] *Id.* ¶ 23.

[59] *Id.* ¶ 25. *See also* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, inc. D/B/A Southwestern Bell Long Distance for Provision of In Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237, ¶ 19 (2001) ("Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability").

grant of section 271 authority in a state means that all of the requirements of section 271, including the incorporated requirements of section 272, have been "fully implemented."[60] Instead, the Commission held that "full implementation'' must be determined on the basis of whether the "goals" of the underlying statutory provisions have been fulfilled.[61] Qwest cannot possibly make that showing, and does not even attempt it.

Ultimately, the "fully implemented'' requirement of section 10(d) must be interpreted in light of the purposes of section 271. Section 271 is intended to open local markets to competition *and* ensure no backsliding by the BOCs after section 271 relief is granted. That will be accomplished only when the Bells' incentives to backslide are eliminated, which will occur only when, at a minimum, there is ubiquitous availability of durable, cost-based, wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. Qwest has produced no such evidence. Accordingly, the "fully implemented" requirement is not satisfied, and the Commission is therefore barred from granting Qwest's forbearance requests.

IV. QWEST FAILS TO SATISFY THE THREE SECTION l0(a) CONDITIONS FOR FORBEARANCE OF "BROADBAND'' OBLIGATIONS.

In all events, Qwest cannot meet the specific requirements for forbearance contained in section 10(a). Under section l0(a), the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."[62] First, the proponent of

[60] *Verizon Forbearance Order* ¶ 7.

[61] *Id.*

[62] *Cellular Telecommunications & Internet Assn. v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

forbearance must show that enforcement of the specific regulations that apply to the "telecommunications service" at issue "is not necessary to ensure that the charges, practices, classifications, or regulations . . . in connection with that . . . telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory."[63] Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers."[64] And, third, it must show that non-enforcement of those regulations "is consistent with the public interest,"[65] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[66]

Here, Qwest is seeking forbearance from regulations that apply to the "telecommunications services" of providing to competitive carriers, *inter alia*, unbundled network elements (including loops and transport), physical collocation, resale at a wholesale discount, and access to poles, ducts, conduits, and rights-of-way. Thus, under section l0(a)(l), Qwest must demonstrate that the regulations from which it is seeking forbearance – *i.e.*, the 251(c) and 271 requirements – are unnecessary to ensure just, reasonable, and nondiscriminatory terms and conditions for those services.

With respect to access to unbundled local loops and other wholesale inputs, this showing is foreclosed by the *Triennial Review Order* and the *USTA II* decision. In the *Triennial Review Order*, the Commission held that the ability of new providers to

---

[63] 47 U.S.C. § 160(a)(l).

[64] *Id.* § 160(a)(2).

[65] *Id.* § 160(a)(3).

[66] *Id.* § 160(b).

compete with incumbent LECs would be impaired without access to such loops.[67] This determination was *not* upset in the *USTA II* decision. Moreover, under the Commission's impairment test, impairment exists when natura1 monopoly and sunk cost entry barriers make it uneconomic for competitive carriers to deploy their own loops.[68] In light of these findings, the loop access regulations from which Qwest seeks forbearance are clearly necessary to prevent the exercise of market power over the services at issue. Qwest has the ability to charge supracompetitive prices for wholesale access to its loops – or deny access altogether – because it is economically infeasible for competitive carriers to self-deploy their own loops. And, for the same reasons, competitive carriers must continue to have unbundled access to Qwest's transport and other wholesale inputs.

Nor could competitive carriers turn to alternative providers for such wholesale inputs. In the first place, Qwest has failed to demonstrate the availability of such wholesale inputs from wireline carriers, and, indeed, has shown that the largest *retail* wireline competitor is *100% reliant* on Qwest's provision of such inputs. In addition, cable facilities cannot be used by competitive carriers to offer voice and data services and, in all events, Cox does not offer such wholesale access. To the extent that forbearance would allow Qwest to exercise any market power over the leasing of access to its local networks, the Commission's precedent makes clear that it must be denied.[69]

---

[67] *See, e.g., Triennial Review Order* ¶¶ 248, 253, 288, 325-26.

[68] *Triennial Review Order* ¶¶ 75-78.

[69] *See, e.g.*, First Report and Order, *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd 17414 ¶ 13 (2000) ("In determining whether to forbear from applying specific statutory or regulatory provisions, our goal, consistent with sound public policy and Congressional intent, is to deregulate wherever the operation of competitive market forces is capable of rendering regulation unnecessary. At the same time, . . . the decision to forbear from enforcing

Moreover, Qwest has produced no evidence whatsoever that access to its retail services at wholesale discounts, access to its poles, ducts, conduits, and rights-of-way, or access to physical collocation in Qwest's serving offices and remote terminals is unnecessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the provision of competitive local services. Indeed, Qwest's petition establishes that resale is a necessary tool for competitive carriers to "increase their market presence beyond the reach of their existing networks" and "more quickly than would be possible solely through expansion of their own networks." Petition pp. 16-17. Furthermore, Qwest has provided no explanation whatsoever regarding how facilities-based competitive carriers – who in all events would rely upon unbundled access to Qwest's local loops – could provide service without physical collocation in Qwest's serving offices and/or remote terminals and without access to Qwest's poles, ducts, conduits, and rights-of-way. Indeed, even cable companies are reliant on access to unbundled access to Qwest's facilities. As shown above, cable companies must have access to ILEC inside-wiring subloops in order to provide cable telephony to subscribers residing in MDUs. Without such access, cable companies would be walled off from a significant number of the consumers who reside in MDUs. Qwest accordingly has not meet its burden under section 10(a)(1).

For these same reasons, Qwest's petition does not satisfy section 10(a)(3). That provision requires the Commission to examine whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." Granting Qwest an unregulated monopoly clearly does

statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met").

not “promote competitive market conditions” or “enhance competition among providers of telecommunications services.” As Dr. Selwyn points out, denying CLECs access to the wholesale inputs they need “will decidedly *not* ‘promote competitive market conditions’ and will certainly operate to diminish competition for retail telecommunications services.” Selwyn Decl. ¶ 57 (emphasis in original). Indeed, granting Qwest’s petition could have competition limiting implications far beyond the Omaha MSA. Thus, to the extent that a grant of the petition were seen by the investment community as a harbinger of similar actions in other areas, it would “cast a dark shadow over investor interest” and “serve only to *discourage* the efficient facilities-based investment that would otherwise take place.”[70]

Qwest also fails to satisfy section 10(a)(2). Here, Qwest falls back to the Bells’ shop-worn arguments regarding “regulatory parity” and the need to be “freed” of regulation in order to promote investment. However, as the Commission has stated, regulatory parity demands no more than “an analytical approach that is, to the extent possible, consistent across multiple platforms.”[71] That is far different from Qwest’s view, in which regulatory parity necessarily requires identical *outcomes* across different platforms, regardless of the real world circumstances and consequences. As the Commission has stressed, “legal, market, or technological distinctions may *require* different regulatory requirements between platforms” notwithstanding the application of

[70] Selwyn Decl. ¶ 46 (emphasis in original).

[71] Declaratory Ruling, *Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶ 6 (2002) (“*Cable Modem Declaratory Ruling*”).

a consistent analytical framework.[72] And, Qwest simply ignores the Supreme Court's decision validating TELRIC as the pricing methodology for unbundled network elements and holding that TELRIC-based rates had not deterred investment.[73] Qwest thus presents no compelling counter to the fact that it is the sole source for the wholesale inputs competitive carriers need to provide local telephone service.

Qwest position is even more lacking with respect to those unbundled elements it must make available under section 271. In the *Triennial Review Order*, the Commission expressly declined to require the Bells to provide section 271 checklist items at TELRIC-based rates, and instead mandated only that those elements, to the extent they are used to offer interstate service, be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section 202.[74] Qwest, however, seeks to be freed of its obligation to provide unbundling under section 271 at the section 201/202-prescribed nondiscriminatory, just and reasonable rates. The rates, terms and conditions of the voluntary access that Qwest claims it is more than willing to provide and of the section 271 access that it here seeks to evade would be subject to the very same section 201/202 safeguards. Thus, the purpose of Qwest's forbearance petition must be to enable Qwest to deny access to its wholesale services and inputs altogether, even at the "just and

[72] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, ¶ 7 (2002) ("*Wireline Broadband NPRM*") (emphasis added).

[73] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 517 n.33 (2002) (the evidence does not "support [the] assertion that TELRIC will stifle incumbents' 'incentive ... either to innovate or to invest' in new elements," because it is "commonsense" that "so long as TELRIC brings about some competition, the incumbents will continue to have incentives to invest and to improve their services to hold onto their existing customer base"); *id.* at 517-19 (TELRIC includes forward-looking cost of capital and depreciation lives that are sufficient to compensate carriers for the risks they incur when investing in new facilities).

[74] *Triennial Review Order* ¶ 663.

reasonable" rates mandated by section 201. The very fact that Qwest is fighting so hard to deny altogether any obligation to provide CLECs access to these facilities – access that would be provided upon the same terms as "voluntary" access – gives the lie to Qwest's claim that it would actively seek out wholesale relationships with CLECs.

Finally, Qwest falls back to arguments that unbundling is "time consuming" and "expensive." Again, this argument fails because so long as Qwest retains substantial market power over the wholesale inputs required by competitive carriers, complaints that it is "costly" for it to comply with the section 251(c) and 271 rules are patently insufficient under section 10 to justify the wholesale repeal of core nondiscrimination and unbundling requirements that Qwest seeks.

V. QWEST'S REQUEST THAT IT BE TREATED AS A NONDOMINANT, NON-ILEC SHOULD BE DENIED.

In addition to its requests that it be relieved of its statutory duties under sections 251(c) and 271, Qwest asks the Commission to forbear from treating Qwest as a dominant carrier and as an ILEC. For the reasons set forth above with respect to forbearance from sections 251(c) and 271, the Commission should deny this request. Moreover, granting Qwest's demand for nondominant, non-ILEC treatment would raise the specter of additional abuse by Qwest of its bottleneck control over special access and could result in significant increases in Qwest's already above-cost switched access charges. Qwest's petition should be denied for these reasons as well.

As Dr. Selwyn documents (¶ 51), AT&T still must rely upon Qwest's special access services for the overwhelming preponderance of its high-capacity loops in the Omaha MSA, even in the portion of the Omaha MSA with the highest concentration of enterprise customer locations – downtown Omaha itself. As AT&T has demonstrated elsewhere, the Commission's premature granting of pricing flexibility to ILECs that retain market power with respect to last-mile high-capacity facilities, *i.e.*, special access, has resulted in a significant increase in the price of special access services where such flexibility has been granted.[75] Indeed, less than ten days ago, Qwest filed a tariff transmittal proposing to increase its special access rates in MSAs where it has received Phase II Pricing Flexibility by 9% to 94%, with an average increase of 27%.[76] Moreover, based on 2003 calendar year data, Qwest's special access rate of return before these substantial rate increases "is a whopping 68%."[77] The ability to impose such significant rate increases and to realize such considerable rates of return demonstrates the enduring market power Qwest enjoys over necessary last mile inputs.

Declaring Qwest nondominant would exacerbate this situation and permit Qwest to squeeze its competitors even further in their ability to provide services to business customers. Even where it has received pricing flexibility with respect to special access, Qwest is required to establish generally available tariffs applicable to all special access customers. Selwyn Decl. ¶ 53. If, however, Qwest were to be treated as a nondominant, non-ILEC, it presumably would not be covered by the *Pricing Flexibility Order*'s requirement that carriers subject to Phase I or Phase II pricing flexibility still file such tariffs. *Id.* ¶ 54. If that were the case, Qwest would be free to engage in "surgically-targeted" competitive pricing initiatives, offering lower prices to customers facing actual

---

[75] *See, e.g., Petition of AT&T Corp. for Rulemaking to Reform Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, filed October 15, 2002.

[76] *See* Petition of AT&T Corp., *Qwest Corporation*, Transmittal No. 206, filed August 23, 2004, pp.1-2.

[77] *Id.*

competitive choices while potentially raising rates above those in its generally available tariffs for special access services furnished to the vast majority of locations where no competitor offers service. *Id.* This would increase Qwest's market power in the Omaha MSA, and such a result should not be countenanced by the Commission.

Granting Qwest's petition could also cause a significant increase in interstate switched access rates. In its 2001 *CLEC Access Charge Order*,[78] the Commission established limits on the level of interstate switched access charges that CLECs may impose, which were based on the incumbent LECs access charge rate levels within the same geographic footprint. Selwyn Decl. ¶ 86. Thus, CLECs may set their charges no higher than those charged by the ILEC. *Id.* If, however, Qwest were no longer to be deemed an ILEC, there would be no limiting ILEC rates in those portions of the Omaha MSA served by Qwest, and Qwest arguably would be free to increase its interstate switched access charges for call originating or terminating in the Omaha MSA at will. *Id.* This is an example of a potential consequence that could be caused by granting Qwest's petition, and one which has not been addressed by Qwest.[79]

[78] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, FCC 01-146 (2001).

[79] In addition, the grant of Qwest's petition arguably could negate Qwest's duty to comply with the Part 32 accounting rules, file ARMIS reports, and comply with the Part 36 separations requirements with respect to the Omaha MSA. Qwest could also have to revise its Cost Allocation Manuals to reflect the separation between ILEC and non-ILEC operations. *See* Selwyn Decl. ¶ 84.

CONCLUSION

For all of the reasons set forth herein, Qwest's petition for forbearance should be denied.

Respectfully submitted,

/s/ Stephen C. Garavito

Leonard J. Cali
Lawrence J. Lafaro
AT&T Corp.
One AT&T Way
Room 3A214
Bedminster, NJ 07921
908-532-1850

Stephen C. Garavito
James J. R. Talbot
AT&T Corp.
1120 20th Street, N.W.
Suite 1000
Washington, DC 20036
202-457-3878

August 24, 2004

ATTACHMENT A

ATTACHMENT B

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Opposition of AT&T Corp. was served on the following by placement in the United States mail, postage prepaid, on the 24th day of August, 2004:

/s/ Sabrina Carter
Sabrina Carter

Andrew D. Crain
Robert B. McKenna
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005

Attorneys for Qwest Corporation